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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/806,083	03/22/2004	Peter J. Ashwood Smith	120-429	1381

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EXAMINER	
RYMAN, DANIEL J	
ART UNIT	PAPER NUMBER
2616	

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	04/10/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary	Application No.	Applicant(s)	
	10/806,083	ASHWOOD SMITH, PETER J.	
	Examiner	Art Unit	
	Daniel J. Ryman	2616	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *09 March 2007*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1,3-12 and 14-26* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1,3-12 and 14-26* is/are rejected.

7)☒ Claim(s) *1,4 and 11* is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☒ The drawing(s) filed on *17 August 2006* is/are: a)☒ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Response to Arguments

1. Examiner acknowledges Applicant's filing of an RCE on 9 March 2007.

2. Applicant's arguments filed 9 March 2007 have been fully considered but they are not persuasive. On page 10 of the Response, Applicant asserts that, as amended, claims 1, 12, and 22 recite a different invention than that claimed in the '354 patent, and therefore statutory double patenting does not apply. Specifically, Applicant asserts that "[c]laims 1, 12, and 22 of the present application could be literally infringed without literally infringing a corresponding claim in the patent." Applicant elaborates by stating, "claims 1, 12, and 22 each recite an initial label availability indication which a person of ordinary skill in the art recognizes could be a formal structure for the organization of information, such as a list, queue, stack, array, hash table, or a tree." Thus, Applicant concludes that "[c]laims 1, 12, and 22 could be infringed by a method using an indication of label availability not comprising a label list (as recited in the '354 patent) that includes one or more label identifiers." Examiner, respectfully, disagrees.

3. With respect to Applicant's assertion that using a "queue" as the "indication of label availability" would not infringe a claim containing the term "list," *The Authoritative Dictionary of IEEE Standard Terms* defines the term "queue" as "a list that is accessed in a first-in, first-out manner." Since a "queue" is defined to be a "list," Examiner maintains that a method using a queue as an indication of label availability would infringe both claims 1, 12, and 22 of the present application as well as claims 1, 11, and 20 in USPN 6,738,354.

4. With respect to Applicant's assertion that using a "stack" as the "indication of label availability" would not infringe a claim containing the term "list," *The Authoritative Dictionary*

of IEEE Standard Terms defines the term "stack" as "a list in which items are appended to and retrieved from the same end of the list, known as the top." Since a "stack" is defined to be a "list," Examiner maintains that a method using a stack as an indication of label availability would infringe both claims 1, 12, and 22 of the present application as well as claims 1, 11, and 20 in USPN 6,738,354.

5. With respect to Applicant's assertion that using an "array" as the "indication of label availability" would not infringe a claim containing the term "list," *The Authoritative Dictionary of IEEE Standard Terms* defines the term "array" as "an n-dimensional ordered set of data items identified by a single name and one or more indices, so that each element of the set is individually addressable." *The Authoritative Dictionary of IEEE Standard Terms* defines the term "list" as "a set of data items, each of which has the same data definition." Since an array containing indications of label availability is a "set of data items, each of which has the same data definition [i.e. each data item is a label indication]," an "array," as broadly defined, is a "list." Therefore, Examiner maintains that a method using an array as an indication of label availability would infringe both claims 1, 12, and 22 of the present application as well as claims 1, 11, and 20 in USPN 6,738,354.

6. With respect to Applicant's assertion that using a "hash table" as the "indication of label availability" would not infringe a claim containing the term "list," *The Authoritative Dictionary of IEEE Standard Terms* defines the term "hash table" as "a two-dimensional table of items in which a hash function is applied to the key of each item to determine its hash value." *The Authoritative Dictionary of IEEE Standard Terms* defines the term "table" as "an array of data, each item of which may be unambiguously identified by means of one or more arguments."

Since a "hash table" is as broadly defined an "array" and since, in view of the above analysis, an "array" is as broadly defined a "list," a "hash table" is also as broadly defined a "list." Therefore, Examiner maintains that a method using a hash table as an indication of label availability would infringe both claims 1, 12, and 22 of the present application as well as claims 1, 11, and 20 in USPN 6,738,354.

7. With respect to Applicant's assertion that using a "tree" as the "indication of label availability" would not infringe a claim containing the term "list," *The Authoritative Dictionary of IEEE Standard Terms* defines the term "tree" as "a nonlinear data structure consisting of a finite set of nodes in which one node is called the root node and the remaining nodes are partitioned into disjoint sets, called subtrees, each of which is itself a tree." *The Authoritative Dictionary of IEEE Standard Terms* defines the term "node" as "in a tree, an element that is used to contain information that describes some object; for which there is at least one key used to identify the node." *The Authoritative Dictionary of IEEE Standard Terms* defines the term "list" as "a set of data items, each of which has the same data definition." Since a tree containing indications of label availability as its nodes is a "set of data items, each of which has the same data definition [i.e. each node is data item comprising a label indication]," a "tree," as broadly defined, is a "list." Therefore, Examiner maintains that a method using a tree as an indication of label availability would infringe both claims 1, 12, and 22 of the present application as well as claims 1, 11, and 20 in USPN 6,738,354.

8. In view of the foregoing, Examiner maintains any "indication of label availability" would also comprise a "list," given that the term "list" covers any set of data items, each of which have the same data definition. As such, Examiner maintains that the claims in the current application

recite the same invention as that claimed in the '354 patent, and therefore a statutory double patenting rejection of the claims is proper.

Claim Objections

9. Claim 1 is objected to because of the following informalities: in line 7, "analyzing" should be "revising" since it is unclear how a label indication can be modified "to produce an end-to-end label availability indication" through mere analysis; in lines 8-9, "destination node of labels available for use" should be "destination node based on labels for use" since this amendment aligns the currently confusing phrase with wording used in claim 1 of the '354 patent and also the wording of other claims. Appropriate correction is required.

10. Claim 4 is objected to because of the following informalities: in line 2, "analyzing" should be "revising". Appropriate correction is required.

11. Claim 11 is objected to because of the following informalities: in line 8, "the reduced label list" should be "the end-to-end label availability indication" since "reduced label list" lacks antecedent basis. Appropriate correction is required.

Double Patenting

12. A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

13. Claims 1, 3-12, and 14-26 are rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 1-24 of prior U.S. Patent No. 6,738,354. This is a double patenting

rejection. Although independent claims 1, 12 and 22 contain slightly different wording ("label availability indication indicative of respective corresponding labels available for use by the source node" and "the label switched traffic being associated with labels for use in switching the traffic between the source node and the destination node, each label identifying a respective data transport wavelength") than the wording contained in independent claims 1, 11, and 20 in USPN 6,738,354 ("label list having one or more label identifiers indicative of respective corresponding labels available for use by the source node" and "the label switched traffic made up of packets containing labels used to switch the packets between the source node and the destination node, each label comprising a respective data transport wavelength"), these claims, nonetheless, encompass the same subject matter.

14. Simply, a "label availability indication indicative of respective corresponding labels available for use by the source node" would necessarily be a "label list having one or more label identifiers indicative of respective corresponding labels available for use by the source node." Examiner fails to see how a node could indicate respective corresponding labels available for use by the source node without using a list having one or more label identifiers.

15. In addition, "the label switched traffic being associated with labels for use in switching the traffic between the source node and the destination node" and "the label switched traffic made up of packets containing labels used to switch the packets between the source node and the destination node" are equivalent since both limitations require that the label switched traffic have a label that is used to switch the packets. Further, "each label identifying a respective data transport wavelength" and "each label comprising a respective data transport wavelength" are equivalent since both limitations require that the label relate to a transport wavelength.

16. Thus, although the claim language is slightly different, claims 1, 12 and 22 disclose the same invention as independent claims 1, 11, and 20 in USPN 6,738,354, respectively. Additionally, claims 3-11 are equivalent to claims 2-10 in USPN 6,738,354, respectively; claims 14-21 are equivalent to claims 12-19 in USPN 6,738,354, respectively; and claims 23-26 are equivalent to claims 21-24 in USPN 6,738,354, respectively.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Daniel J. Ryman whose telephone number is (571)272-3152. The examiner can normally be reached on Mon.-Fri. 8:00am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Huy Vu can be reached on (571)272-3155. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Daniel J. Ryman
Examiner
Art Unit 2616

Daniel Ryman